

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Time Warner Cable Inc.
Petition for Determination of Effective
Competition in Six Communities in New York
State
CSR 8363-E

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 2010

Released: November 15, 2010

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc., hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as the "Communities." Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended ("Communications Act"), and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DIRECTV, Inc. ("DIRECTV"), and DISH Network ("DISH"). The petition is unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules. The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPDs"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the

1 See 47 U.S.C. § 543(l)(1)(B).

2 47 C.F.R. § 76.905(b)(2).

3 47 C.F.R. § 76.906.

4 See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

5 See 47 C.F.R. §§ 76.906 & -.907.

households in the franchise area.⁶ This test is referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁷

5. Turning to the first prong of this test, it is undisputed that the Communities are “served by” both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁸ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.⁹ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹⁰ and is supported in this petition with citations to the channel lineups for both DIRECTV and DISH.¹¹ Also undisputed is Petitioner’s assertion that both DIRECTV and DISH offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹² Accordingly, we find that the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Communities.¹³ Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code plus four basis.¹⁴

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁵ as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

8. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence

⁶ 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷ 47 C.F.R. § 76.905(b)(2)(i).

⁸ *See* Petition at 3-5.

⁹ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁰ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 5-6.

¹¹ *See* Petition at 4, 6.

¹² *See id.* at 6-7.

¹³ *See id.* at 7.

¹⁴ *See id.* at 7-8 & Exhs. D-I. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

¹⁵ Petition at 7-8.

demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc. **IS GRANTED**.

10. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of any of the Communities set forth on Attachment A **IS REVOKED**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

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¹⁶ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8363-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Town of Chili	NY0795	16.34%	10159	1660
Village of Churchville	NY0943	16.18%	723	117
Town of Clarkson	NY1005	18.53%	2034	377
Town of Gates	NY0415	15.82%	11730	1856
Town of Hamlin	NY1343	19.08%	3255	621
Town of Henrietta	NY0661	22.73%	12823	2915

*CPR = Percent of competitive DBS penetration rate.